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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ASM AMERICA, INC.,

No. 01-2190 EDL

Plaintiff,

**ORDER REGARDING MOTIONS  
TO STRIKE, STAY, DISMISS  
AND AMEND**

v.

GENUS, INC.,

Defendant.

GENUS, INC.,

Counterclaimant,

v.

ASM AMERICA, INC., and  
ASM INTERNATIONAL, N.V.,

Counterdefendants.

Before the Court is Plaintiff-Counterdefendant ASM America’s (“ASM”) Motion to Strike Inequitable Conduct Defenses, to Sever and Stay Antitrust Claim and Related Discovery, and to Dismiss Pursuant to Rule 12(b)(6) [15], Defendant-Counterclaimant Genus’ (“Genus”) Cross-Motion for Leave to Amend Its Answer and Counterclaims [20], and ASM’s Motion for Leave to File Amended Complaint and to Supplement the Case Management Order [18]. The first two motions were heard on December 11, 2001; the latter motion was heard on December 18, 2001. As explained in more detail below, the Court

1 grants in part and denies in part ASM's Motion to Strike, Sever and Stay, and to Dismiss; grants Genus'  
2 Cross-Motion for Leave to Amend; and grants ASM's Motion for Leave to File Amended Complaint and  
3 Supplement the Case Management Order.

#### 4 **I. Introduction**

5 The parties in this case sell manufacturing equipment that is used to make semiconductor chips via  
6 atomic layer deposition or chemical vapor deposition. ASM America is the Arizona-based subsidiary of  
7 ASM International N.V., a Dutch company (collectively, "ASM"). Genus, Inc. ("Genus") is based in  
8 Santa Clara, California.

9 ASM America initially sued Genus for infringement of U.S. Patent No. 6,015,590 ("the '590  
10 patent") and No. 5,916,365 ("the '365 patent"). Genus counterclaimed for infringement of U.S. Patent  
11 No. 5,294,568 ("the '568 patent"). ASM now seeks leave to amend the complaint to include allegations  
12 of infringement of U.S. Patent No. 4,798,165 ("the '165 patent") and to add Dr. Arthur Sherman, the  
13 inventor of the '365 patent, as a plaintiff.

14 The '590 and '365 patents assigned to or controlled by ASM concern methods for atomic layer  
15 deposition ("ALD"),<sup>1</sup> a process used in manufacturing semiconductor wafers. The '568 patent assigned to  
16 Genus claims a method for selective etching of native oxides deposited during the manufacturing process.  
17 The '165 patent that ASM proposes to add to this case concerns a "showerhead" device used to regulate  
18 the flow of gases into the reaction chambers used for ALD and other types of manufacturing processes.  
19 Each of the motions before the Court will be discussed in turn.

#### 20 **II. ASM's Motion to Strike Inequitable Conduct Defenses**

21 ASM moves to strike Genus' Fifth Affirmative Defense (paragraphs 18-19 of the Answer and  
22 Counterclaim), which asserts the defense of inequitable conduct before the Patent and Trademark Office  
23 ("PTO"). This defense is raised as to both the '365 and '590 patents.

24 Motions to strike are governed by Federal Rule of Civil Procedure 12(f), which permits the Court  
25 to order stricken from any pleading "any insufficient defense or any redundant, immaterial, impertinent, or  
26 scandalous matter." Fed. R. Civ. P. 12(f). Motions to strike an affirmative defense are disfavored, but are  
27

28 \_\_\_\_\_  
<sup>1</sup> This process is also referred to by ASMA under its trademark, Atomic Layer Chemical Vapor Deposition or Atomic Layer CVD™. Atomic layer epitaxy ("ALE") is another generic name for this process.

proper when the defense is insufficient as a matter of law. *See, e.g., Chiron Corp. v. Abbott Labs.*, 156 F.R.D. 219, 220 (N.D. Cal. 1994) (Patel, J.) (citation omitted).

The doctrine of inequitable conduct (also sometimes referred to as “fraud on the PTO”) renders a patent unenforceable if the patent applicant acted inequitably before the PTO in prosecuting the patent. *See, e.g., Chiron*, 156 F.R.D. at 220 (citations omitted); *Advanced Cardiovascular Sys., Inc. v. Medtronic, Inc.*, 41 U.S.P.Q.2d 1770, 1996 WL 467273 at \*5 (N.D. Cal. 1996) (Jensen, J.). Inequitable conduct includes “affirmative misrepresentation of a material fact, failure to disclose material information, or submission of false material information, coupled with an intent to deceive.” *Semiconductor Energy Lab. Co., Ltd. v. Samsung Elecs. Co., Ltd.*, 204 F.3d 1368, 1373 (Fed. Cir. 2000), *cert. denied*, 531 U.S. 1190 (Feb. 26, 2001) (hereafter “*SEL*”) (quoting *Molins PLC v. Textron, Inc.*, 48 F.3d 1172, 1178 (Fed. Cir. 1995)).

Allegations of inequitable conduct involve fraud and are subject to the heightened pleading requirements of Federal Rule of Civil Procedure 9(b). *See, e.g., Advanced Cardiovascular Sys.*, 1996 WL 467273 at \*5; *Raychem Corp. v. PSI Telecomms., Inc.*, 1995 WL 108193 at \*2 (N.D. Cal. 1995) (Aguilar, J.); *Chiron*, 156 F.R.D. at 220. Materiality and intent to deceive must be specifically pleaded. *See SEL*, 204 F.3d at 1373 (discussing elements of inequitable conduct claim); *see also Xilinx, Inc. v. Altera Corp.*, 33 U.S.P.Q.2d 1149, 1994 WL 782236 at \*2-3 (N.D. Cal. 1994) (Whyte, J.) (discussing pleading requirements). Further, the time, place and content of any alleged misrepresentations made to the PTO as well as the identities of the parties to the misrepresentation must be specified. *Sun Microsystems, Inc. v. Dataram Corp.*, 1997 WL 50272 at \*4 (N.D. Cal. 1997) (Williams, J.).

The patent regulations require each individual associated with the filing of a patent application “to disclose to the Office all information known to that individual to be material to patentability.” 37 C.F.R. § 1.56 (2001). Information disclosure statements provided to the PTO must include a legible copy of “each publication or that portion which caused it to be listed.” 37 C.F.R. § 1.98(a)(2)(ii) (2001). Genus contends that ASM engaged in inequitable conduct by failing to disclose relevant prior art to the PTO in connection with both the ‘590 patent and the ‘365 patent.

#### A. The ‘590 patent

Genus alleges that the inventors of the ‘590 patent, Tuomo Suntola and Sven Lindfors, and the attorneys involved in the prosecution of the patent, Sterne, Kessler, Goldstein & Fox P.L.L.C.,

were aware of aspects of Tuomo Suntola’s prior art work, publications, and patents in Atomic Layer Deposition, Molecular Beam Epitaxy, and Atomic Layer Epitaxy, including but not limited to the publication *Atomic Layer Epitaxy* (T. Suntola & M. Simpson eds. 1990), that were material to the patentability of the claims in the ‘590 patent, but withheld this prior art from the U.S. Patent and Trademark Office, materially misrepresenting the state of the art, with an intent to deceive that Office. (Answer and Counterclaim at ¶ 18.)

ASM attacks these allegations, particularly the failure to disclose unidentified “aspects” of Dr. Suntola’s prior work, as lacking the specificity required by Rule 9(b). ASM also asks this Court to strike this defense on the innovative ground that it is “implausible.” (ASM’s Motion to Strike at 8:10.) ASM points out that the face of the ‘590 patent identifies nineteen *other* patents among the references cited (some of which Dr. Suntola holds) and lists a subsequent article by Dr. Suntola, also entitled “Atomic Layer Epitaxy,” that postdates the omitted work by two years. ASM cites *Fiskars, Inc. v. Hunt Mfg. Co.*, 221 F.3d 1318, 1327 (Fed. Cir. 2000), *cert. denied*, 121 S. Ct. 1603 (Apr. 16, 2001), which states, “An applicant cannot be guilty of inequitable conduct if the reference was cited to the examiner, whether or not it was a ground of rejection by the examiner.”

Genus disputes the lack of specificity but requests leave to amend its Answer and Counterclaims to this patent to refer only to the failure to disclose *Atomic Layer Epitaxy* to the PTO and to delete the reference to aspects of Dr. Suntola’s prior work. Genus contends that this amendment addresses ASM’s concerns about specificity.<sup>2</sup>

The Court finds that Genus adequately pleaded that the 1990 work *Atomic Layer Epitaxy* was withheld from the PTO, but did not plead the requisite level of specificity as to Dr. Suntola’s unspecified other prior art work. The Court therefore grants ASM’s motion to strike as to the ‘590 patent with leave to amend. The Court grants Genus’ request to file its proposed amendment previously lodged with the Court, which cures this lack of specificity.

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<sup>2</sup> The parties are cautioned that cross-motions on the same schedule as the original motion are no longer proper under the Civil Local Rules of this Court. Because Genus’ cross-motion does not expand the issues in the original motion at all, however, the Court will nonetheless consider it.

1           B. The '365 patent

2           Genus alleges with respect to the '365 patent that:

3                     [T]he named inventor of the '365 patent, Arthur Sherman, the attorneys involved in  
4                     the prosecution of the '590 [*sic*] patent including, without limitation, Robert Moll and  
5                     his colleagues at Wilson Sonsini Goodrich & Rosati, and/or other persons  
6                     substantively involved in the preparation or prosecution of the applications for the '365  
7                     patent, were aware of prior art that was material to the patentability of claims in the  
8                     '365 patent, including without limitation, an article entitled "Atomic layer epitaxy of Si  
9                     using atomic H," authored by S. Imai, T. Iizuka, O. Sugiura, and M. Matsumura,  
10                    published in the journal *Thin Solid Films*, 225 (1993) 168-172, but withheld this prior  
11                    art from the U.S. Patent and Trademark Office, materially misrepresenting the state  
12                    of the art, with an intent to deceive that Office. (Answer and Counterclaim at ¶ 19.)

13           ASM contends that Genus' affirmative defense must be stricken because the referenced article (by  
14           S. Imai et al.) was contained in the *Proceedings of the Second International Atomic Layer Epitaxy*  
15           *Symposium*, in *Thin Solid Films*, vol. 225(1-2), (1993), which was disclosed to the PTO even though it  
16           was not specifically cited to the patent examiner as an independent article. ASM also argues that Genus  
17           fails to specify what specific aspect of the Imai article was not covered cumulatively in the other references  
18           supplied to the patent examiner, or to identify who in particular made the misrepresentation.

19           Genus responds that ASM did not provide copies of the documents to the examiner and placed the  
20           burden on the examiner to obtain them. Genus asks the Court to equate ASM's failure to disclose readily-  
21           available and lengthy documents in English to the rather more nefarious conduct in *SEL* involving a  
22           misleading partial translation of a twenty-nine-page document in Japanese.

23           On a motion to strike, the Court is limited to considering the material appearing on the face of the  
24           pleadings. The Court cannot consider extrinsic evidence such as Moll's letter to the examiner (albeit cited  
25           by Genus in opposition to the motion) explaining why copies of the *Proceedings* were not provided. While  
26           this defense falls short of alleging misconduct like that in *SEL* and may well fail on summary judgment, the  
27           Court declines to foreclose it at this early pleading stage. As pled, however, it lacks specificity (e.g.,  
28           "including, without limitation"). Accordingly, ASM's motion to strike Genus' inequitable conduct defense  
29           as to the '365 patent is granted with leave to amend. Genus shall amend its inequitable conduct affirmative  
30           defense to provide greater specificity about ASM's failure to comply with the requirements of applicable  
31           sections of the patent regulations and ASM's intent to mislead the PTO thereby, as discussed at the  
32           December 11, 2001 hearing.

III. Motions for Leave to Amend

1 The parties moved for leave to amend their pleadings under Federal Rule of Civil Procedure 15(a).  
2 Genus' opposition to ASM's motion to strike, sever, and stay contains a cross-motion for leave to amend  
3 its antitrust counterclaims, as addressed above. ASM separately moves for leave to file an amended  
4 complaint naming Arthur Sherman, the inventor of the '365 patent, as a plaintiff and adding claims of  
5 infringement of the '165 patent.

6 *A. Legal Standard*

7 Federal Rule of Civil Procedure 15(a) provides that leave to amend "shall be freely given when  
8 justice so requires." Fed. R. Civ. P. 15(a); *see, e.g., Bowles v. Reade*, 198 F.3d 752, 757 (9th Cir.  
9 1999) ("strong policy permitting amendment"); *Yakima Indian Nation v. Washington Dep't of Revenue*,  
10 176 F.3d 1241, 1246 (9th Cir. 1999) (same); *Beery v. Hitachi Home Elecs. (Am.), Inc.*, 157 F.R.D.  
11 481, 483, 485 (C.D. Cal. 1994) (applying "extremely liberal" policy to permit amendment of patent  
12 infringement complaint). Leave to amend should be granted "unless amendment would cause prejudice to  
13 the opposing party, is sought in bad faith, is futile, or creates undue delay." *Yakima Indian Nation*, 176  
14 F.3d at 1246 (citation and internal quotation marks omitted); *Bowles*, 198 F.3d at 757. Undue delay alone  
15 is insufficient to justify denying a motion to amend. *Bowles*, 198 F.3d at 757.

16 *B. Genus' Motion for Leave to Amend*

17 Genus seeks to amend its counterclaims to allege that the relevant geographic scope of the ALD  
18 market is worldwide, that the worldwide ALD market is "an area of effective competition where buyers can  
19 find alternative sources of supply," and that "no other goods and services are reasonably interchangeable  
20 with the particular and distinct semiconductor manufacturing equipment and processes" that make up the  
21 ALD market. (Opp. Brief at 17:13-15, 18:13-18; *see also* Answer and Counterclaim at ¶¶ 39-46 and  
22 Proposed Amended Answer and Counterclaim at ¶¶ 39-46.) Genus further seeks leave to amend its  
23 predatory pricing claim to state that "[t]here is a dangerous probability that ASMI and ASM America will  
24 recoup their investment in below-costs [*sic*] sales of the Polygon™ tool and the Pulsar™ chamber by  
25 virtue of, without limitation, their control of over 50% of the ALD market," and to specify the alleged  
26 barriers to entry in the ALD market. (Opp. Brief at 20:17-21:2; Proposed Amended Answer and  
27 Counterclaim at ¶ 39.) Applying the liberal policy of Rule 15(a), the Court grants Genus' motion for leave  
28 to amend its Answer and Counterclaim.

*C. ASM's Motion for Leave to File Amended Complaint and Supplement Case Management Schedule*

1. Dr. Sherman

As noted above, ASM seeks leave to amend its complaint to name Dr. Arthur Sherman, inventor of the '365 patent, as a plaintiff. Genus does not oppose the addition of Dr. Sherman as a plaintiff, provided that his inclusion does not delay the scheduling established in this case, and provided that Dr. Sherman is counted as part of the "ASM side" for purposes of discovery limits. The Court grants ASM's motion to amend its complaint to add Dr. Sherman as a party. Dr. Sherman will be considered part of the "ASM side" for purposes of the discovery limits.

2. The '165 patent

ASM also seeks leave to amend its complaint to add allegations that Genus infringed its '165 patent. The device that is the subject of this patent is a "showerhead" that regulates the flow of gases into the reaction chambers used for the ALD processes claimed in the '590 and '365 patents. Genus opposes the addition of the '165 patent to this case on the ground that its inclusion will cause delays at least equal to those that would be caused by Genus's antitrust counterclaims, absent the stay ordered by the Court today.

The Court is not persuaded. While the addition of a fourth patent to the three patents already at issue will complicate the case somewhat, the "showerhead" device in the '165 patent is interwoven with the existing patents and will not add an undue amount of new material to the case. Moreover, counsel for Genus has previously litigated aspects of the '165 patent within this very district in an unrelated case. Further, Genus agrees that if the '165 patent were the subject of a separate action, it would be related to this case. At this early stage of the litigation, in light of the liberal policy favoring amendment of the pleadings, the Court grants ASM's motion for leave to amend its complaint to add the '165 patent infringement claim.

The real issue is timing. ASM chose not to include this older patent in its original complaint, but now urges that discovery and claims construction occur on an accelerated basis to "catch up" with the original patents in suit. ASM does not provide any particularly persuasive reason for this new haste. At the same time, Genus cannot seriously contend that discovery will be greatly complicated because its counsel previously conducted considerable discovery on this patent and stipulated to the use of that discovery in this case. Genus correctly points out, however, that it is premature for the Court to decide now whether trial of

the '165 patent should be bifurcated from that of the other patents. The Court concludes that the previously-set claims construction hearings for the other patents should proceed first, as scheduled. The tutorial on the '165 patent will follow on September 19, 2002 at 9:00 a.m., with the claims construction hearing on September 26, 2002 at 9:00 a.m.

#### IV. ASM's Motion to Sever and Stay Antitrust Claims and Related Discovery

Pursuant to Rule 42(b), ASM moves to sever and stay Genus' four antitrust claims and related discovery until after a determination of whether or not ASM's patents are invalid. Rule 42(b) provides that the Court may order a separate trial of claims, counterclaims, or issues "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy." Fed. R. Civ. Proc. 42(b); *see also Ellingson Timber Co. v. Great N. Ry. Co.*, 424 F.2d 497, 499 (9th Cir. 1970) ("One of the purposes of Rule 42(b) is to permit deferral of costly and possibly unnecessary discovery proceedings pending resolution of potentially dispositive preliminary issues.")

Genus asserts counterclaims for antitrust violations based on four theories: (1) predatory pricing; (2) attempted monopolization based on a patent accumulation theory; (3) attempted monopolization based on a *Walker Process*<sup>3</sup> theory (i.e., acquisition of fraudulently-procured patents); and (4) attempted monopolization based on a *Handgards* theory (i.e., sham litigation as an act in restraint of competition).<sup>4</sup>

ASM argues that a stay will simplify the case, avoid confusion, and reduce the burden and costs imposed on the Court, the attorneys, and the parties by deferring the burdensome and expensive discovery that would necessarily arise from litigation of the antitrust claims, and possibly avoiding it altogether. The Court agrees that a stay would promote an efficient resolution of the patent invalidity issues and substantially narrow or eliminate the antitrust claims as a result. As Genus itself recognizes, its sham litigation and fraudulent procurement theories fail if the patents are not invalidated. Conversely, the *Kobe* patent accumulation theory fails if the pooled patents are declared invalid.

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<sup>3</sup> *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 176-77 (1965).

<sup>4</sup> Monopolization and attempted monopolization are prohibited by the Sherman Antitrust Act. 15 U.S.C. § 2. To state a claim for monopolization under Section 2 of the Sherman Act, a plaintiff must allege that: (1) the defendant possesses monopoly power in the relevant market; (2) the defendant willfully acquired or maintained that power; (3) and the defendant's conduct caused antitrust injury. *See, e.g., Cost Mgmt. Servs. v. Washington Natural Gas Co.*, 99 F.3d 937, 949 (9th Cir. 1996). To state a claim for attempted monopolization, a plaintiff must allege: (1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct to accomplish the monopolization; (3) a dangerous probability of success; and (4) causal antitrust injury. *Id.* at 949-50.



1 Genus nonetheless argues that a stay of the antitrust claims will irreparably harm both Genus and  
2 competition in the ALD market, and that this prejudice outweighs any benefits of severance. Its allegation  
3 of irreparable harm rings somewhat hollow, however, in light of its failure to bring its antitrust claims against  
4 ASM independently. Genus also contends that a stay would not be beneficial because the antitrust claims  
5 will require separate discovery in any event.

6 It is a common practice in federal court to stay antitrust counterclaims until after the trial of the  
7 invalidity issue. *See, e.g., In re Innotron Diagnostics*, 800 F.2d 1077, 1084 (Fed. Cir. 1986) (discussing  
8 the “now-standard practice of separating for trial patent issues and those raised in an antitrust  
9 counterclaim”); *Hewlett-Packard Co. v. Genrad, Inc.*, 882 F. Supp. 1141, 1157-58 (D. Mass. 1995)  
10 (staying counterclaim based on inequitable conduct; “[C]ourts often separate patent issues from antitrust  
11 counterclaim issues . . . Antitrust issues are complex and, particularly with respect to damages, raise  
12 different issues and proof.”); *Baxter Int’l, Inc. v. Cobe Lab., Inc.*, 1992 WL 77665 at \*2, 4 (N.D. Ill.  
13 1992) (severing and staying discovery and trial of antitrust counterclaim in light of lack of common issues  
14 other than fraudulent procurement, prejudice to plaintiff in defending patent claim and *Handgards* claim  
15 simultaneously, burden on jury, and possibility that issues relating to antitrust counterclaim could be  
16 rendered moot); *Carlisle Corp. v. Hayes*, 635 F. Supp. 962, 967-68 (S.D. Cal. 1986) (severing and  
17 staying counterclaim alleging that defendant attempted to monopolize market by seeking to enforce a patent  
18 obtained by fraud on the PTO); *Pharmacia, AB v. Hybritech, Inc.*, 224 U.S.P.Q. 975, 976, 1984 WL  
19 1479 (S.D. Cal. 1984) (severing and staying antitrust and patent misuse counterclaims based on fraudulent  
20 procurement, predatory pricing, and tying); *Components, Inc. v. Western Elec. Co., Inc.*, 318 F. Supp.  
21 959, 966-67 (D. Me. 1970) (severing and staying antitrust counterclaims from patent claims for  
22 convenience of parties and court and to avoid delay in resolving patent issues). The reasoning in all of these  
23 cases supports the severance and stay in this case of the discovery and trial of Genus’ antitrust  
24 counterclaims until after a trial on the patents.

25 Here, the benefits derived from a stay of the antitrust counterclaims outweigh any prejudice.  
26 Indeed, proceeding on the antitrust claims simultaneously with the patent claims may well delay resolution of  
27 the case by increasing its complexity exponentially, whereas many issues will likely be mooted by  
28 addressing the patent claims first. Resolution of the invalidity issue may dispose of some of the antitrust  
counterclaims altogether, and may potentially narrow the damages inquiry on any remaining claims to

1 particular products or product lines. Given the multiple patents already at issue in this case, and the wide  
2 swath of non-overlapping discovery on the antitrust claims that will be required in addition to any discovery  
3 germane to both patent and antitrust claims, the Court concludes that a stay of the antitrust claims will  
4 promote judicial economy significantly.

5 Moreover, although Genus submitted a declaration regarding the window of opportunity in the  
6 emerging market for ALD manufacturing equipment, as noted above a stay at this time will not necessarily  
7 delay the ultimate determination of the antitrust claims significantly longer than no stay at all, because of the  
8 added complexity of proceeding on a variety of fronts simultaneously. Thus, Genus has failed to  
9 demonstrate prejudice resulting from a stay that would outweigh the judicial economy certain to result from  
10 a stay.

11 Therefore, discovery and trial of Genus' antitrust counterclaims are stayed until after trial on the  
12 patents at issue. The stay shall take effect upon the filing of Genus' Amended Answer and Counterclaims.  
13 This order staying the antitrust counterclaims is without prejudice to a motion by either party to lift the stay  
14 based on equitable harm, provided that such a motion is based on changed circumstances. The Court is  
15 mindful of Genus' concerns and will proceed expeditiously to resolve the entire matter as quickly and  
16 efficiently as possible.

#### 17 **V. ASM's Motion to Dismiss Antitrust Claims**

18 As an alternative to its motion to sever and stay, ASM moves for dismissal of the antitrust  
19 counterclaims pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. In light of  
20 the Court's decision to allow amendment and then grant a stay, ASM's motion to dismiss is denied as  
21 moot.

#### 22 **VI. Conclusion**

23 For the foregoing reasons, the Court orders as follows:

- 24 1. ASM's motion to strike Genus' inequitable conduct defense as to the '590 patent is  
25 granted with leave to amend.
- 26 2. ASM's motion to strike Genus' inequitable conduct defense as to the '365 patent is  
27 granted with leave to amend.
- 28 3. Genus' cross-motion for leave to amend its Answer and Counterclaims is granted.

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4. ASM's motion to sever and stay discovery and trial of Genus' antitrust counterclaims until after the trial on the invalidity claim is granted without prejudice. The stay shall take effect upon the filing of Genus' Answer and Counterclaims.
5. ASM's alternative motion to dismiss the antitrust counterclaims is denied as moot in light of the amendments and stay.
6. A second tutorial on the '568 patent shall be held starting at 1:30 p.m. on June 18, 2002, in Courtroom E of this Court, 450 Golden Gate Avenue, 15th Floor, San Francisco, California. A third tutorial on the '165 patent shall be held starting at 9:00 a.m. on September 19, 2002. The claims construction hearing for the '165 patent shall be held at 9:00 a.m. on September 26, 2002. The parties shall meet and confer on a briefing and disclosure schedule for the '165 patent based on the dates provided for the claims construction hearing and the tutorial, and shall jointly submit a proposed schedule to the Court no later than January 25, 2002.

Date: January 9, 2002

\_\_\_\_\_/s/\_\_\_\_\_  
ELIZABETH D. LAPORTE  
United States Magistrate Judge